

NTSB Order No. EA-3928

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 1st day of July, 1993

Dockets SE-13095 and
SE-13096

The Administrator has appealed from the oral initial decision issued by Administrative Law Judge William R. Mullins at the conclusion of a hearing limited to sanction held in these consolidated cases on June 3, 1993.¹ In that decision, the law judge affirmed the Administrator's emergency order revoking the

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airline transport pilot certificate of respondent Alan Curtis based on his admitted falsification of flight records pertaining to eight flights operated by respondent Oklahoma Executive Jet Charter, Inc. (OEJC), in violation of 14 C.F.R. 61.59(a)(2)². With regard to OEJC, which was charged with the same regulatory violation based on the same incident of falsification, the law judge modified the sanction sought in the emergency order from revocation of OEJC's air carrier operating certificate to assessment of a \$3,500 civil penalty. It is from this modification of sanction that the Administrator appeals. As discussed below, we deny the Administrator's appeal and affirm the law judge's initial decision.³

² Section 61.59(a)(2) provides as follows:

§ 61.59 Falsification, reproduction, or alteration of applications, certificates, logbooks, reports, or records.

(a) No person may make or cause to be made --
* * *

(2) Any fraudulent or intentionally false entry in any logbook, record, or report that is required to be kept, made, or used, to show compliance with any requirement for the issuance, or exercise of the privileges, or any certificate or rating under this part . . .

³ Respondent Curtis filed an appeal from the initial decision seeking to contest the revocation of his airline transport certificate, but Curtis failed to perfect the appeal by timely filing of an appeal brief. His appeal is therefore dismissed pursuant to 821.57(b). Accordingly, we need not address the Administrator's contention that Curtis' notice of appeal should be considered untimely. In light of our dismissal of Curtis' appeal, we will not consider the arguments included in the reply brief which challenge the revocation of Curtis' airman certificate, nor need we consider the "supplemental" reply brief, which consists almost entirely of arguments in support of Curtis' disallowed appeal. We note, however, that the supplemental brief

At the hearing in this case respondents Alan Curtis (president, chief pilot, director of operations, and check airman for OEJC) and OEJC, through counsel, stipulated to the allegations contained in the complaints, as amended.⁴ (Tr. 6.) Respondent Curtis freely admitted that he knowingly falsified records of eight flights operated by OEJC by changing the name of the pilot in command. (Tr. 6, 8-9, 14, 18, 52, 56.) He explained that he was under the impression that his check airman authorization had lapsed sometime before he gave check rides to two pilots, so he changed the flight records in an attempt to cover up what he then believed were OEJC's illegal use of pilots who had not received proper check rides. It subsequently became apparent that there actually had been no lapse in his check airman authorization. (Tr. 14-7.)

In affirming the revocation of respondent Curtis' airman certificate the law judge held that, despite the fact that his falsifications did not conceal an underlying safety violation, those falsifications nonetheless compromised the integrity of the reporting system and showed a lack of qualifications to hold an
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suggests an attempt by respondent Curtis to withdraw his voluntary admission to the charges in the amended complaint, made on the record and with assistance of counsel. No grounds for the untimely withdrawal of the stipulations made at trial are offered. (See Tr. 6.)

⁴ The complaints were amended at the hearing to delete allegations that respondent Curtis gave check rides to two pilots after his check airman authorization had expired, and that respondent OEJC used those pilots when they had not passed the required flight check, in violation of 14 C.F.R. 135.299(a). (Tr. 5, 68.)

airman certificate. (Tr. 70-3.)

In explaining his reasons for modifying the sanction against OEJC from revocation of its operating certificate to a civil penalty, the law judge first referred to the new civil penalty legislation⁵ which authorizes the Board to modify the type of sanction to be imposed from suspension or revocation to assessment of a civil penalty. (Tr. 73.) He then stated that he believed a civil penalty against OEJC would be appropriate because 1) the "alter ego" theory under which the Administrator sought to hold OEJC responsible for respondent Curtis' falsification would not have been available against a larger business, and 2) revocation of OEJC's operating certificate would adversely affect the several individuals and businesses in the community that depend, either in full or in part, on OEJC for

⁵ The FAA Civil Penalty Administrative Assessment Act of 1992, Pub. L. No. 102-345, § 3, 106 Stat. 923 (1992) adds the following language to section 609(a) of the Federal Aviation Act (49 U.S.C. 1429(a)) (new language in italics):

Any person whose certificate is affected by such an order [amending, modifying, suspending, or revoking a certificate] of the Administrator under this section may appeal the Administrator's order to the Board and the Board may, after notice and hearing, amend, modify, or reverse the Administrator's order. *In the conduct of its hearings under this subsection, the Board shall not be bound by any findings of fact of the Administrator but shall be bound by all validly adopted interpretations of laws and regulations administered by the Federal Aviation Administration and of written agency policy guidance available to the public relating to sanctions to be imposed under this subsection unless the Board finds that any such interpretation is arbitrary, capricious, or otherwise not in accordance with law. The Board may, consistent with this subsection, modify the type of sanction to be imposed from suspension or revocation of a certificate to assessment of a civil penalty.*

their economic survival. (Tr. 74-6.) After considering proposed civil penalty amounts submitted by counsel, and noting the fact that OEJC had already been shut down for several weeks, the law judge concluded that a civil penalty of \$3,500 would be appropriate. (Tr. 76.)

On appeal, the Administrator does not challenge the law judge's authority to impose a civil penalty in lieu of revocation. Nor does he argue that the civil penalty assessed by the law judge is inconsistent with any written agency sanction guidance available to the public. Rather, the Administrator simply argues that the revocation of OEJC's operating certificate should be reinstated because the law judge gave no clear and compelling reasons for reducing the sanction, as required by Administrator v. Muzquiz, 2 NTSB 1474, 1477 (1975).⁶ The Administrator asserts that under Board precedent revocation is the appropriate sanction for falsification, and the reasons given by the law judge for the modification in sanction provided no basis to reduce the sanction.

In reply, OEJC maintains that it was within the law judge's discretion to modify the sanction. OEJC asserts that the falsification in this case did not implicate flight safety, and that there is Board precedent for imposing sanctions less than revocation in falsification cases. OEJC further argues that the

⁶ The Muzquiz doctrine, as it is commonly referred to, requires a law judge to offer clear and compelling reasons for reducing a sanction sought by the Administrator when all of the violations alleged in the order are affirmed. See also Administrator v. Pearson, 3 NTSB 3837, 3839 (1981).

Muzquiz doctrine is inapplicable to this case because the Administrator did not prove all of the charges in the complaint.

Finally, OEJC asserts that the economic impact of revocation of its operating certificate was properly considered as a mitigating factor.

The Aircraft Owners and Pilots Association (AOPA) and the NTSB Bar Association have moved for leave to file amicus curiae briefs arguing in support of the law judge's modification of sanction. Because this is the first case in which the Board has been asked to review a law judge's exercise of the newly-granted statutory authority to modify sanctions from certificate action to civil penalty, and in light of our determination that the briefs were timely filed,⁷ and that they do not unduly broaden the matters at issue or prejudice the parties, we have accepted these amicus briefs and considered the arguments set forth therein.⁸

Upon careful consideration of the record and the briefs filed in this case, we have concluded that no reason has been

⁷ AOPA's brief was filed within the time period allowed for filing respondent's reply brief (i.e., by June 21). Although the NTSB Bar Association's brief was filed on June 22, permission to file the brief was timely requested.

⁸ OEJC's motion for oral argument is denied. While this case is a matter of first impression under the Civil Penalty Assessment Act, it is also an emergency proceeding in which OEJC lost its right to do business immediately, and the Board is only permitted 60 days within which to complete its process of review. Given our disposition, we do not believe that OEJC suffers any prejudice from the denial of its motion. We have considered several briefs and we do not believe our disposition of this case would be aided by the presentation of oral argument.

shown to reverse the law judge's modification of the sanction against OEJC from revocation to assessment of a \$3,500 civil penalty. Such a modification is clearly authorized by the civil penalty legislation, and the Administrator has proffered no written, publicly available agency sanction guidance to which the Board might owe deference under the statutory scheme adopted in 1992.⁹ Nor are we aware of any previous cases in which revocation of an air carrier operating certificate was upheld under similar circumstances.¹⁰

⁹ To the extent that agency sanction guidelines exist they are generally found in the FAA's Sanction Guidance Table. To date, whether this Guidance Table will be considered capable of satisfying the 1992 amendments requiring written and publicly available sanction policy has not been litigated. NTSB Bar Association argues here that the Guidance Table should not be so considered, but we do not reach this proposition, as the Administrator has not placed any reliance on the Table. However, we do note that the Guidance Table does not appear to contemplate that a violation of falsified records such as found here could be charged against an air carrier or air taxi operator. The Guidance Table contains sanction guidance pertaining to falsification charges against individuals, and record-keeping violations by operators, but (other than one mention of falsification of records implicating airport security) it makes no reference to falsification charges against an operator. See FAA Order No. 2150.3A, Appendix 4. Hence, the Administrator's failure to offer written sanction guidance may arise out of an inability to do so. In any event, in the absence of such a proffer, this agency must exercise its own discretion in concluding the case, paying to the Administrator such deference as is due to the logic of his position and the responsibilities of his office.

¹⁰ The Administrator cites Administrator v. Charter Flight Services, Inc., and Michael Shane Wiskus, NTSB Order No. EA-3131 (1990), a case where we upheld revocation of an air taxi's operating certificate and the airman certificate of its owner/operator (Wiskus), based in part on Wiskus' falsifications of flight time records so as to conceal flight and duty time violations. However, in that case, unlike this case, the air taxi operator was itself found to have independently violated several safety regulations (relating to flight time limitations

In upholding the law judge's modification of sanction, we do not necessarily subscribe to the explicit reasoning offered in the oral initial decision issued at hearing. However, we are in certain agreement with a number of his general propositions. In particular, we agree that the falsification of records is a most serious offense and certainly calls into question the qualifications of an airman to hold a certificate. It does not appear that the law judge hesitated at all with this proposition.

His revocation of the airman's certificate is clearly in line with Board precedent, precedent established out of a need to insure the integrity of records which, because of the enormousness of the aviation community under safety review, are an essential underpinning of an effective enforcement program.

Nevertheless, the judge did not find that the record supported carrying this revocation policy forward to the carrier.

We must presume that this judgment was in large part predicated on the fact that the Administrator dropped the Part 135 charges that applied directly to the air carrier certificate. The record does not offer any suggestion as to whether the Administrator reconsidered sanction subsequent to this substantial amendment in the charges. We know only that, based on the so-called alter ego

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and use of an unauthorized aircraft) which placed compliance responsibility directly on the operator. In this case, OEJC was charged only with violating section 61.59(a)(2), a regulation which speaks only to falsifications by individuals. In any event, Charter Flight Services clearly does not stand for the general proposition that where an individual in control of an operator is found to have falsified, the company is always equally culpable.

theory, the Administrator continued to press for the proposition that the acts of the respondent airman should be attributed to the carrier with the same severity of outcome. While this theory is not without some merit, the Board must also place reliance on the law judge's ability to sort out a host of issues and nuances which can be observed at trial and in discovery, but which do not come before us. Respondent testified at hearing, as did a number of supporting witnesses, and such testimony will have given the law judge in this case an opportunity to observe the demeanor and character of respondent and the merits of his position.

Likewise, the judge will have observed first hand the merits of the Administrator's case. Having had this exposure, we view the law judge's modification of sanction as being predicated on an implicit judgment that OEJC does not lack the requisite qualifications to hold its operating certificate.¹¹

¹¹ To view the case thus, we must confront the paradox that respondent as airman has suffered revocation precisely on the grounds of lack of qualification, but that the same individual might be expected to exercise his corporate regulatory responsibilities satisfactorily. There is less to this paradox than meets the eye. In the first instance, the law judge observed that respondent, after mistakenly concluding that he had given invalid check rides, had taken steps to ensure that those airmen he thought had been improperly accredited did not continue to operate aircraft for which he believed they were not current.

Thus, the law judge could conclude that respondent was not callous or intentional with regard to violation of operational principles. Second, the law judge may have also concluded, with more than adequate justification, that respondent would be chastened by the outcome in this proceeding. The loss of his airman privileges will certainly alert him to the necessity of great care in record keeping as well as operational functions. Finally, the air carrier will not be the same company in the aftermath of this proceeding. While respondent will still be its alter ego in some respects, without the privileges of an airman certificate he can no longer perform as chief pilot and check

Against this judgment of our law judge we have little more than the Administrator's misplaced reliance on the Muzquiz doctrine. This doctrine essentially requires law judges to defer to the Administrator's choice of sanction when all of the violations alleged in the complaint have been affirmed, clearly not the situation here. We note first that our newly-granted statutory authority to modify sanction from suspension or revocation to assessment of a civil penalty casts considerable doubt over the continued viability of the Board's self-imposed Muzquiz doctrine.¹² But even assuming the Muzquiz doctrine remained intact after the new legislation, it does not govern this case because not all of the charges in the complaint were affirmed. The alleged violation of 14 C.F.R. 135.299(a) (use of pilots who had not passed the required flight check) was deleted by the Administrator at the beginning of the hearing, leaving only the section 61.59(a)(2) violation. (Tr. 5.) As noted above, we are aware of no sanction guidance or precedent indicating that revocation is the only appropriate sanction for

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airman, meaning that, for instance, the responsibility for check ride status that gave rise to this case will no longer involve respondent Curtis, as another check airman will necessarily be employed.

¹² The Board has sought public comment on the issues raised by implementation of the new civil penalty legislation. See 59 Fed. Reg. 11379 (Feb. 25, 1993). It is the position of the AOPA and NTSB Bar Association that Muzquiz has been overtaken by the sanction modification provisions in the new law. We do not reach this issue here because the question is not squarely before us, as the Administrator's reliance on the doctrine could not, even under old law, be countenanced. Consequently, we prefer to await the resolution of this issue in a proceeding without the time constraints of this emergency.

such a violation by an air taxi operator.

Finally, although the law judge's implicit finding that OEJC violated section 61.59 has not been challenged in this proceeding, we feel compelled to note that the applicability of that regulation to a Part 135 operator such as OEJC is questionable at best. The regulation on its face does not prohibit falsification of records required to be kept by Part 135 operators. Rather, it speaks only to intentionally false or fraudulent entries in records required to be kept in connection with certificates and ratings issued under Part 61 (i.e. those issued to pilots and flight instructors). Consistent with this limitation, the regulation only authorizes suspension or revocation of airman and ground instructor certificates or ratings.¹³ Not surprisingly in light of the above, the FAA's own Sanction Guidance Table (FAA Order No. 2150.3A, Appendix 4) contains no sanction guidance related to a falsification violation by an operator like OEJC.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied; and

¹³ Paragraph (b) of section 61.59 provides:

(b) The commission by any person of an act prohibited under paragraph (a) of this section is a basis for suspending or revoking any airman or ground instructor certificate or rating held by that person.

2. The initial decision assessing a \$3,500 civil penalty against OEJC is affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.